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In the Supreme Court of the United States

OCTOBER TERM, 1977

GUY OSCEOLA, APPELLANT

v.

JEROME K. KUYKENDALL, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS OR AFFIRM

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Pursuant to Rule 16(1)(a), (c) and (d) of the Rules of this Court, appellees move the Court to dismiss this appeal for want of jurisdiction, to vacate the judgment below and remand for dismissal on mootness grounds, or to affirm the order of the three-judge district court.

OPINION BELOW

The opinion of the district court (J.S. App. A-8 to A-19) is not yet reported.

JURISDICTION

The judgment of the three-judge district court was entered on March 11, 1977. A notice of appeal was filed on May 4, 1977, and the jurisdictional statement was filed on July 1, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction over appellant's direct appeal from an order of a three-judge district court dismissing his claim, without consideration of its merits, on the ground that it was premature.

2. Whether appellant's claim for declaratory and injunctive relief against appellee members of the Indian Claims Commission is moot.

3. Whether the district court correctly concluded that appellant's claim was premature.

STATEMENT

Appellant, who claims to be a "mem[illegible]of the Seminole Nation,"[1] brought this action on behalf of himself and a class of Seminoles who allegedly "have never been militarily defeated, have never signed a written treaty of peace, and have never ceded nor given over their right to freely live upon and utilize their aboriginal territory in what is now known as Florida."[2] Named as defendants were the five individual Commissioners of the Indian Claims Commission. In his complaint, appellant sought to enjoin entry of judgment in a consolidated case pending before the Commission on the grounds that the Act of August 13, 1946, 60 Stat. 1049, as amended, 25 U.S.C. 70 *et seq.*, creating the Commission is unconstitutional on its face and as applied to him and his class.

The consolidated case before the Commission was initiated by the Seminole Indians of Florida on August 14, 1950. That action (Docket No. 73) was later consolidated

[1]Complaint, p. 2. Appellant claims to represent a distinct group of Seminoles known as the Everglades Miccosukee Tribe of Seminole Indians.

[2]*Ibid.*

with a second petition (Docket No. 151) filed by the Seminole Indians of Oklahoma on July 23, 1951. The petitioners in both cases filed as representatives of the Seminole Indian Nation as it existed in Florida prior to 1823[3] and sought additional compensation for "Seminole" lands ceded to the United States under the Treaties of September 18, 1823, 7 Stat. 224, and May 9, 1832, 7 Stat. 368.

On September 17, 1954, while the consolidated action was pending before the Commission, a group of Indians purporting to act for themselves and for the "General Council of the Miccosukee Seminole Nation of Florida" filed a special appearance with the Commission and a "motion to quash" the petitions filed by the Seminoles of Florida and Oklahoma. The movants alleged that the petitions presented claims to lands on which members of the Miccosukee Seminole Nation resided and that the General Council of their Tribe had not authorized anyone to bring such an action on its behalf. On motion of the petitioners, the Commission struck the special appearance and the motion to quash from the record on April 8, 1955. The Court of Claims dismissed an appeal from that action by the Commission for lack of a final order (*Billie* v. *Seminole Indians of the State of Florida*, 146 F. Supp. 459 (Ct. Cl.)), and this Court denied certiorari (355 U.S. 843).[4]

On September 18, 1961, the same group of Indians, purporting to represent the "Executive Council of the

[3]When the petitions were filed, the Seminoles of Florida were not organized or recognized by the Secretary of the Interior under Section 16 of the Indian Reorganization Act of 1934, 48 Stat. 987, 25 U.S.C. 476. In 1957, certain Seminoles organized themselves and were recognized by the Secretary of the Interior. This recognized Tribe was thereafter substituted as petitioners in Docket No. 73. 19 Ind. Cl. Comm. 440, 445.

[4]The appeal to the Court of Claims was not renewed when the Commission entered its final judgment in 1976.

Miccosukee Nation," filed with the Commission a motion to dismiss the petitions filed by the Seminoles of Florida and Oklahoma. That motion was denied by the Commission on the same day (13 Ind. Cl. Comm. 326, 343). No appeal from that ruling was taken.[5]

On May 8, 1964, the Commission issued an interlocutory order finding that until September 18, 1823, the Seminole Nation, as then constituted, had possessed "Indian title" to most of the present State of Florida; that the United States had acquired the Seminole lands in Florida, outside a defined reservation, under the Treaty of September 18, 1823, 7 Stat. 224; that the Seminole Nation had recognized title to the 1823 reservation until May 9, 1832; and that the Seminole Nation of Oklahoma and the Seminole Indians of Florida, together, comprised the Seminole Nation as it existed in Florida until 1823. 13 Ind. Cl. Comm. at 339-340, 367-368. This decision was affirmed on appeal. *United States* v. *Seminole Indians of the State of Florida and the Seminole Nation of Oklahoma,* 180 Ct. Cl. 375.

On January 29, 1968, the federally-recognized Miccosukee Tribe of Indians of Florida moved for leave to intervene in the proceedings before the Commission.[6] In its supporting memorandum the federally-recognized Tribe disavowed the earlier attempts by Miccosukee Indians in 1954 and 1961 to dismiss the petitions, characterizing the first as "ill-advised" and the second as unauthorized. The Commission denied leave to intervene, holding that the Miccosukee Tribe had a common and undivided interest in

[5]Appellant associates himself with the Miccosukee Indians who filed the 1954 motion to quash and the 1961 motion to dismiss.

[6]These Miccosukee Indians organized and were recognized as a tribe under Section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. 476, on January 11, 1962. Appellant disavows any connection with the federally-recognized Miccosukee Tribe.

Docket No. 73 and that its interest was adequately represented by petitioners in that case (19 Ind. Cl. Comm. 440, 441-442, 446). The Commission stated that the Miccosukee Tribe "shares a community of claims with the organized Seminole Indians of the State of Florida, both being components of 'The Seminole Nation as it existed in Florida at all material times' * * *" (*id.* at 445).[7] No appeal was taken from that decision.

On October 22, 1970, the Commission entered a final judgment for $12,262,780.63 (24 Ind. Cl. Comm. 1). Both sides appealed, and the action was remanded for more detailed findings concerning the value of the land involved. *Seminole Indians of the State of Florida and the Seminole Nation of Oklahoma* v. *United States*, 455 F. 2d 539 (Ct. Cl.). Subsequently, the parties filed a joint motion with the Commission on March 17, 1976, settling all claims of the Seminoles of Florida and Oklahoma for $16 million (38 Ind. Cl. Comm. 62). Judgment for the amount was entered on April 27, 1976 (38 Ind. Cl. Comm. 91). No appeal from the Commission's final judgment was taken.

Meanwhile, appellant filed the complaint in this case on March 26, 1976. He alleged that entry of judgment in the proceedings before the Commission would deprive him and members of his class of their property without due process of law and deny them equal protection in violation of the Fifth Amendment. He also alleged that the Indian Claims Commission Act was unconstitutional on its face because it delegated to the Secretary of the Interior, without appropriate standards, authority to determine who may proceed before the Commission, and that the Act was unconstitutional as applied to him and his class because it

[7]The Commission accepted the Miccosukees' contention that they were not enrolled with, a part of, or associated with the petitioners in Docket No. 73. 19 Ind. Cl. Comm. at 443.

deprived them of rights without notice or opportunity to be heard. Finally, he alleged that entry of judgment by the Commission would deprive him of property in violation of international law. This allegation was based on an assertion that the United States had entered into a binding oral treaty with his ancestors in 1842.

After briefing and argument, the three-judge district court on March 11, 1977, granted appellees' motion to dismiss for failure to state a claim on which relief could be granted (J.S. App. A-8 to A-19). In its memorandum opinion (*id.* at A-16, A-18), the court concluded that the asserted property right claimed by appellant amounted only to unrecognized "Indian title," which at most entitled him and his class to possess and occupy the land, the fee title being vested in the United States. Accordingly, the court could not see how entry of judgment on the actions before the Commission would either affect appellant's asserted right of possession and occupancy or confer any new property right on the United States. Noting that there had been no actual or threatened interference with appellant's occupancy and use of the land, the court held that appellant's complaint was "premature" and "sets forth no concrete or current controversy" (*id.* at A-16 to A-18).

ARGUMENT

The decision of the three-judge court, dismissing appellant's claim as premature, may be appealed only to the court of appeals and not directly to this Court. Moreover, we submit that the case is now moot. Assuming that the merits of the district court's decision were nonetheless to be reached, the judgment below should be affirmed summarily on the ground that the questions presented are too insubstantial to merit plenary consideration.

1. The district court declined to reach the merits of appellant's constitutional claims, holding that "[his] complaint is premature" (J.S. App. A-16). The court noted that appellant's asserted rights to possession "are not presently threatened, and they may never be" (*ibid.*), and that judicial resources should not be expended " 'on problems which are abstract or hypothetical or remote' " (*id.* at A-17, quoting Davis, *Administrative Law Text* § 21.01, p. 396 (3d ed., 1972)). The court pointed out that "[appellant's] right of possession and occupancy will not be affected by the [Commission's] judgment" (*id.* at A-16).

Because the district court did not address the issues requiring consideration by a three-judge court, direct appeal does not lie to this Court. *MTM, Inc.* v. *Baxley*, 420 U.S. 799; *Gonzalez* v. *Automatic Employees Credit Union*, 419 U.S. 90. In *MTM*, this Court decided that it had no jurisdiction over a direct appeal from an order of a three-judge court dismissing a suit on *Younger* v. *Harris* (401 U.S. 37) grounds, stating (420 U.S. at 804):

> [W]e conclude that a direct appeal will lie to this Court under §1253 from the order of a three-judge federal court denying interlocutory or permanent injunctive relief only where such order rests upon resolution of the merits of the constitutional claim presented below.

The Court declined to consider not only the merits of the claim but also whether the dismissal was justified, saying the correctness of that decision was for the court of appeals to determine. *Id.* at 804.

Application of that principle to this case is consistent with the limited nature of this Court's appellate jurisdiction. Dismissal for lack of a "concrete or current controversy" (J.S. App. A-18), like the dismissal for lack

of "standing" in *Gonzalez* v. *Automatic Employees Credit Union, supra,* does not require a three-judge court. See *MTM, Inc.* v. *Baxley, supra,* 420 U.S. at 802. Here as in *Gonzalez,* a single district judge could have refused to convene a three-judge court, or the three-judge court could have dissolved itself and left dismissal of the complaint to a single judge. See 419 U.S. at 100; *Ex parte Poresky,* 290 U.S. 30. In those events there could have been no appeal to this Court under 28 U.S.C. 1253, and hence there can be none here. *Gonzalez, supra,* 419 U.S. at 101.

The Court therefore should either dismiss this appeal for want of jurisdiction or, as it did in *MTM, supra,* vacate the order of the district court and remand the case to that court for entry of a fresh order from which timely appeal to the court of appeals might be taken. See 420 U.S. at 804.

2. Moreover, we submit that the case is moot. Appellees can no longer provide appellant with the relief he seeks, and hence there is no controversy between the present parties.

Appellant in his complaint sought an injunction against the entry of judgment by the Indian Claims Commission in *Seminole Indians of the State of Florida and the Seminole Nation of Oklahoma* v. *United States* (Docket Nos. 73 and 151). However, the district court declined to issue a temporary restraining order, and the Commission entered its final judgment in that case on April 27, 1976 (38 Ind. Cl. Comm. 91). No appeal was taken, and the judgment was subsequently reported to Congress pursuant to 25 U.S.C. 70t. See 122 Cong. Rec. S 6152 and H 3691 (daily ed., April 29, 1976). Congress appropriated funds to satisfy the judgment (Act of June 1, 1976, Pub. L. 94-303, 90 Stat. 597, 629; S. Doc. No. 94-180, 94th Cong., 2d Sess. 3 (1976)), and the appropriated funds were deposited in the United States Treasury for distribution.

In these circumstances, appellee Commissioners no longer have jurisdiction or power to grant the relief appellant requests. Congress has acted pursuant to the Commission's final judgment, and the injunction sought by appellant "would ostensibly avoid an event which had already passed beyond recall" (*Brownlow* v. *Schwartz,* 261 U.S. 216, 217). See also *Richardson* v. *McChesney,* 218 U.S. 487, 492. Whatever other avenues of relief may be open to appellant, his action against appellees is moot.

Thus, assuming *arguendo* that the Court has jurisdiction to consider this appeal, it should vacate the judgment below and remand with a direction to dismiss the action for mootness. *United States* v. *Munsingwear,* 340 U.S. 36,39.

3. If the merits of the district court's decision were nonetheless to be reached, we submit that the court's judgment is correct and should be affirmed.

The district court concluded (J.S. App. A-16, A-18) that appellant has not suffered, and may never suffer, any injury from the decision of the Commission in the *Seminole* cases. Although the complaint is unclear, appellant suggests a claim to original or aboriginal title which, if valid, would merely accord a right to possession and use at the will of the United States. *Tee-Hit-Ton Indians* v. *United States,* 348 U.S. 272, 279.[8] Appellant and his purported class do not claim that their occupancy of lands has been impeded or interrupted or concretely threatened, but only that they "must live with the uncertainty" (J.S. 11) that their possession might someday be challenged.

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[8]An assertion was made that "recognized Indian title" may rest on an "oral" treaty with one of appellant's ancestors in 1842 (see J.S. App. A-12). Article II, Section 2, of the Constitution sets forth the manner in which the United States enters into treaties. Whether or not it encompasses oral agreements, there is no indication here of the requisite Senate approval. See *Sac and Fox Tribe of Indians of Oklahoma* v. *United States,* 315 F. 2d 896, 897 (Ct. Cl.), certiorari denied, 375 U.S. 921.

Appellant nonetheless contends (J.S. 7-10) that he will be unable to defend against any later disruption of his possession because of the *res judicata* or collateral estoppel effects of the Commission's judgment in the *Seminole* cases. Whether this is so need not be determined until such time, if ever, as appellant suffers an interference with his claimed possessory rights. The district court in the present case did not hold that appellant was bound by the judgment of the Commission, and appellant remains free to argue on an appropriate occasion that he was not. Should a court then disagree with appellant and determine on a proper record that he was in privity with, or adequately represented by, the petitioners in those cases, see, *e.g.*, *Hansberry* v. *Lee*, 311 U.S. 32,[9] appellant can seek review of that decision at the appropriate time.[10]

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[9]The decision below does not conflict with *United States* v. *Dann*, D. Nev., Civil No. 7-74-60 BRT, decided January 4, 1976 (J.S. App. A-20 to A-28). In *Dann* the district court concluded that a prior decision of the Court of Claims (*Western Shoshone Legal Defense and Education Association* v. *United States*, 531 F. 2d 495) had settled the question whether the defendants were in privity with certain claimants before the Commission. In the present case the district court has made no such determination, and the question remains open for litigation at a later time.

[10]We do not believe that the constitutionality of the Indian Claims Commission Act, an issue not addressed by the district court, is properly before this Court on the present appeal. If this Court should reject our arguments and conclude that the district court should have considered that issue on its merits, we submit that the case should then be remanded to the district court for that purpose.

CONCLUSION

For the foregoing reasons, the Court should dismiss the appeal for want of jurisdiction, or vacate the judgment below and remand with a direction to dismiss for mootness, or, in the alternative, should affirm the order of the district court.

Respectfully submitted.

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